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Rigid No-Exhaustion Rule for Section 1983 Actions: Patsy v. Board of Regents

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A RIGID NO-EXHAUSTION RULE FOR SECTION 1983 ACTIONS: *PATSY V. BOARD OF REGENTS*

Federal courts often refuse to grant judicial relief until a complainant exhausts the adequate administrative remedies which are available.[1] The United States Supreme Court has described this as a "long settled rule of judicial administration."[2] Several reasons[3] for requiring exhaustion of administrative remedies prior to judicial determination of a case include conservation of judicial resources, utilization of expertise gained by administrative law judges, and a general promotion of the agencies which may provide plaintiffs with more accessible avenues of relief.[4]

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1. *See, e.g.*, Myers v. Bethlehem Corp., 303 U.S. 41, 50-51 (1938) ("no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted"); Rhodes v. United States, 574 F.2d 1179, 1181 (5th Cir. 1978) (generally, a plaintiff must exhaust administrative remedies before seeking judicial relief from the courts). *See also* Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 247 (1952) (state administrative bodies have initial right to . . . take evidence and make findings of fact); J.P. Stevens Employees Educ. Comm. v. NLRB, 582 F.2d 326, 328 (4th Cir. 1978) ("it is well established that orders issued by the [administrative][b]oard . . . are not reviewable until termination of the proceedings and entry of a final order"); Chevron Chemical Co. v. Costle, 443 F. Supp. 1024, 1029 (N.D. Cal. 1978) (initial decisions by an administrative body may not be "preempted or prejudiced" by a court's grant of declaratory relief).

2. Myers v. Bethlehem Corp., 303 U.S. 41, 50 (1938) (plaintiff's contention that he should be allowed to prevent an administrative determination of his case, and instead go directly to the federal district court, was "at war" with the long settled exhaustion requirement). *See also* Petersen Baking Co. v. Bryan, 290 U.S. 570, 575-76 (1933) (when there is no suggestion that plaintiff would have been denied relief by administrative board, exhaustion is required); White v. Johnson, 282 U.S. 367, 373-74 (1930) (plaintiff must pursue an orderly process of administration and the court will not ignore plaintiff's failure to exhaust administrative remedies); Red "C" Oil Co. v. North Carolina, 222 U.S. 380, 394 (1911) ("[w]here one complains that regulations promulgated under legislative authority by a state board are unreasonable and oppressive, he should seek relief by applying to that board to modify them").

3. *See, e.g.*, McKart v. United States, 395 U.S. 185 (1969). In *McKart*, the Supreme Court explained that the exhaustion doctrine is commonly applied when a statute provides that administrative procedures shall be exclusive. *Id.* at 193-95. The doctrine also is invoked to avoid premature interruption of the administrative process. *Id.* For further discussion of the reasons for requiring exhaustion, see *infra* notes 4 & 16-20 and accompanying text.

4. McKart v. United States, 395 U.S. at 193-95. For a general discussion of the reasons for exhaustion, see B. SCHWARTZ, ADMINISTRATIVE LAW § 176 (1976).

Although the exhaustion doctrine is a rule of judicial administration, Congress has found it appropriate in some areas to require exhaustion statutorily. *See, e.g.*, 28 U.S.C. § 2675(a)(1976) (if agency is allegedly responsible for committing a tort, plaintiff must demand relief from that agency). *See also* 28 U.S.C. §§ 2254(b)-2254(c) (1976) (a writ of habeas corpus shall not be granted until state court remedies have been exhausted); 42 U.S.C. § 2000e-5(c) (1976) (provided the state has an available remedy, plaintiff must file state proceedings and wait for a period of 60 days before filing suit in federal court under this statute); 5 U.S.C. § 704 (1976) (agency action must be "final" before it is subject to review by federal courts).

When the exhaustion requirement is statutorily imposed, the discretionary power of the court is removed, and the complainant must show that no avenues of relief remain open in order for the court to decide the case. *See, e.g.*, Rose v. Lundy, _____ U.S. _____ , 102 S. Ct.

In a series of cases brought under 42 U.S.C. § 1983,[5] however, the Supreme Court consistently refused to require exhaustion of administrative remedies.[6] Subsequently, lower federal courts posited divergent interpretations of the Supreme Court opinions. Some courts concluded that the inadequacies of the administrative remedies available in these Supreme Court cases had invoked traditional exceptions to the exhaustion doctrine.[7] Other courts, however, believed the Court had created a rigid no-exhaustion rule for actions brought under section 1983.[8] In *Patsy v. Board of Regents*,[9] the Supreme Court clarified its position by holding that section 1983 plaintiffs are not required to exhaust state administrative remedies before bringing suit in federal court.[10]

Recognizing the differing interpretations given to its prior decisions, the Court chose not to rest its decision solely on stare decisis. Instead, the Court studied the legislative histories of section 1983 and of a more recently enacted statute, 42 U.S.C. § 1997.[11] Because the Supreme Court determined that the congressional intent behind these statutes precluded an exhaustion re-

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1198 (1982) (if a prisoner presents some exhausted and some unexhausted claims in a petition for writ of habeas corpus, all claims will be dismissed).

5. 42 U.S.C. § 1983 (1976 & Supp. III 1979) provides, in part:

> Every person who, under color of any statute, ordiance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

6. *See* Barry v. Bachi, 443 U.S. 55 (1979); Gibson v. Berryhill, 411 U.S. 564 (1973); Carter v. Stanton, 405 U.S. 669 (1972); Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1968); King v. Smith, 392 U.S. 309 (1968); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Education, 373 U.S. 668 (1963).

7. Courts traditionally do not require exhaustion of administrative remedies which have been judicially determined to be inadequate. *See infra* notes 23-27 and accompanying text. In Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970), the court studied the cases in which the Supreme Court had failed to require exhaustion, and concluded that each was based on the inadequacy of the available remedy. 421 F.2d at 569. At the time the Fifth Circuit applied the exhaustion requirement to a § 1983 case in Patsy v. Florida Int'l Univ., 634 F.2d 900 (5th Cir. 1981), *rev'd*, ___ U.S. ___, 102 S. Ct. 2557 (1982), there were four other circuits that did not adhere to a rigid no-exhaustion rule. *See* Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978); Bignall v. North Idaho College, 538 F.2d 243 (9th Cir. 1976); Gonzales v. Shamker, 533 F.2d 832 (2d Cir. 1976); Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973).

8. The Third, Fourth, Sixth, Eighth, and Tenth Circuits interpreted Supreme Court precedent as establishing a rigid no-exhaustion rule under § 1983. *See* Clappier v. Flynn, 605 F.2d 519 (10th Cir. 1979); Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978); Green v. Tim Eyck, 572 F.2d 1233 (8th Cir. 1978); Ricketts v. Lightcap, 567 F.2d 1226 (3d Cir. 1977); Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

9. ___ U.S. ___, 102 S. Ct. 2557 (1982).

10. 102 S. Ct. at 2568.

11. *See id.* at 2561. The recently enacted statute considered by the Court was the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997a-1997e (Supp. IV 1980). For further discussion of the statute, see *infra* notes 82-85 and accompanying text.

quirement under section 1983, the Court found it unnessesary to reach a conclusion about the policy issues involved.[12]

In *Patsy*, however, the Court may have misconstrued congressional intent concerning exhaustion of administrative remedies. The ambiguous legislative history of section 1983 reveals no conclusive evidence of whether Congress desired an exhaustion requirement.[13] Furthermore, the Court's reliance on the recently enacted section 1997 is inapposite. Through the enactment of section 1997, Congress addressed only a narrow class of cases brought under section 1983 and did not articulate its position concerning whether exhaustion generally should be required.[14] Additionally, the *Patsy* decision is inconsistent with a case decided just six months earlier by the Court, *Fair Assessment in Real Estate v. McNary*.[15] The contradictory holdings may reflect the absence of an established policy rationale upon which actions brought under section 1983 should be decided.

BACKGROUND

The Supreme Court has recognized the value of requiring exhaustion of both state and federal administrative remedies.[16] If the complainant receives a satisfactory remedy through the administrative process, resort to the court will be unneccessary, thereby conserving judicial resources.[17] Also, an ad-

12. The Court explained that because the policy considerations involved do not invariably point in one direction, legislative policy decisions are preferable. 102 S. Ct. at 2567. Several Justices, however, did clearly express their personal views concerning the relevant policy issues. Concurring Justices O'Connor and Rehnquist urged Congress to legislatively adopt an exhaustion requirement for § 1983 actions. *Id.* at 2568 (O'Connor, J., concurring). In dissent, Justices Powell and Burger also expressed the belief that exhaustion should be required. *Id.* at 2579 (Powell, J., dissenting). In a separate concurrence, Justice White was less clear in expressing his personal views concerning policy. Justice White explained that whether or not the no-exhaustion rule was initially a wise choice, the question was now stare decisis. *Id.* at 2569 (White, J., concurring).

13. For a discussion of the legislative history of § 1983 and a criticism of the *Patsy* Court's holding that the statute precludes an exhaustion requirement, see *infra* notes 108-18 and accompanying text.

14. In concurrence, Justice White expressed the opinion that by relying on the legislative history of section 1997e, the Court had "unnecessarily and unwisely ventured further to find support where none may be had." 102 S. Ct. at 2569 (White, J., concurring).

15. 454 U.S. 100 (1981). In *Fair Assessment*, the Supreme Court refused to exercise jurisdiction over an action brought under § 1983 and required plaintiffs to exhaust all state remedies. *Id.* at 116. For a more extensive discussion of *Fair Assessment*, see *infra* notes 141-50 and accompanying text.

16. *See* Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 247 (1952) ("[s]tate administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact"). *See also* McKart v. United States, 395 U.S. 185, 193 (1969) (when considering exhaustion of federal administrative remedies, the Court stated that the exhaustion doctrine is a rule of sound judicial administration); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (the exhaustion doctrine is a well-established rule of "judicial administration").

17. *McKart*, 395 U.S. at 194 (court may never have to intervene if plaintiff successfully vindicates his rights in administrative process). *See generally* Comment, *Exhaustion of State*

ministrative agency may be well-suited to resolve issues and make findings of fact because of agency expertise developed in a particular area.[18] By allowing an agency to hear the disputes it was established to resolve, a court will enable the agency to discover and correct its own errors and, therefore, will discourage litigants from circumventing the administrative process.[19] Finally, an efficient administrative agency may result in more accessible relief to complainants.[20]

Generally, to determine whether exhaustion should be required courts look to the adequacy of the available remedy.[21] If an agency provides an appropriate and adequate avenue of relief, the court often requires exhaustion.[22] Traditional exceptions to the exhaustion doctrine, however, safeguard the rights of the complainant. For example, if the administrative procedures are lengthy and do not provide interim relief, exhaustion is not required.[23] Fur-

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Administative Remedies in Section 1983 Cases, 41 U. CHI. L. REV. 537 (1973) (resort to the courts will be less likely if an administrative agency is given an opportunity to correct its own errors) [hereinafter cited as *Exhaustion in Section 1983 Cases*].

18. *See McKart*, 395 U.S. at 194 (an agency should be given the first chance to exercise its expertise). *See also* Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645 (1973). In *Bentex*, the Court explained that agencies were often best equipped to perform their limited functions because of the specialization and insight they gain through experience. Therefore, the Court concluded, preliminary resort should be to the agency. *Id.* at 654.

19. In *McKart*, Justice Marshall, writing for the majority, explained that administrative agencies are created as independent entities and are vested with various powers and duties. The autonomous nature of these agencies usually counsels courts against interfering with administrative action. Frequent and deliberate circumvention of administrative agencies might weaken their effectiveness by encouraging people to ignore them. 395 U.S. at 194-95. *Accord* Wolff v. Selective Service Board, 372 F.2d 817, 825 (2d Cir. 1967) (administration should be free to work out a solution to its own errors, and thus, judicial interference is undesirable).

20. The Supreme Court has explained that "resort to administrative procedures is an expeditious way to settle disputes, conducive to speed and economy." United States v. Grace & Sons, 384 U.S. 424, 429 (1966). Indeed, Congress believed that requiring exhaustion of adequate administrative grievance procedures established in state prisons would encourage states to maintain and improve their systems. Consequently, an exhaustion provision was included in 42 U.S.C. § 1997e (Supp. IV 1980). For further discussion of the legislative intent behind this statute, see *infra* notes 133-38 and accompanying text.

21. Exhaustion is not required if an administrative remedy is found inadequate or unavailable. *See* United States v. Grace & Sons, 384 U.S. 424, 429-30 (1966). *See also* United States v. Holpugh Co., 328 U.S. 234, 240 (1946) (contractor must show administrative remedy is inadequate or unavailable to avoid exhausting the remedy).

22. *See, e.g.*, United States v. Blair, 321 U.S. 730, 736-37 (1944) (plaintiff must exhaust administrative remedies where no evidence that to do so would be futile or prejudicial). Several Supreme Court cases have held that exhaustion is required when there is no showing that administrative remedies are inadequate. *See* Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952); Illinois Commerce Comm'n v. Thomson, 318 U.S. 675 (1943); Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300 (1937); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929).

23. In Walker v. Southern Railroad Co., 385 U.S. 196 (1966) (per curiam), for example, a federal agency established by the Railway Labor Act was designed to arbitrate employment discharge grievances. Because the agency was severely backlogged, the Court determined that no exhaustion was required. *Id.* at 198-99. *Cf.* Oklahoma Natural Gas v. Russell, 261 U.S.

thermore, exhaustion is not required if a court considers the administrative remedy inadequate because the agency involved is not authorized to grant the requested relief,[24] or if it is clear the agency will reject the claim, making resort to the agency futile.[25] Exhaustion may even be required when a constitutional claim is raised;[26] however, if an agency or its actions are directly challenged as unconstitutional, then no exhaustion is required.[27]

These various exceptions are not mechanically applied, and federal courts maintain wide discretion in determining whether exhaustion is required in a particular case.[28] Most importantly, by requiring exhaustion of administrative remedies, a court is not asserting that it has no jurisdiction over the case; rather, the exhaustion doctrine is concerned with the timing of judicial review.[29] Therefore, if after exhausting administrative remedies the

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290 (1923) (injunctive relief can be granted by federal court to prevent irreparable injury even if state remedies are not exhausted).

24. *See* United States v. Grace & Sons, 384 U.S. 424, 430 (1966) (if an administrative officer clearly lacks the authority to grant relief, the administrative remedy may be considered "unavailable"); Public Utilities Comm'n of Ohio v. United Fuel Gas Co., 317 U.S. 456, 468 (1943) (because the Federal Power Commission, and not the state agency involved, maintained exclusive power to provide the remedy requested, no exhaustion of state administrative remedies required).

25. In United States v. Blair, 321 U.S. 730 (1944), the Court implied that if there is evidence that an appeal to the agency administrator would be prejudicial or futile, exhaustion should not be required. *Id.* at 736. *See also* United States v. Grace & Sons, 384 U.S. 424, 430 (1966) (if an administrative officer reveals an unwillingness to comply with proper procedure, the plaintiff need not exhaust the agency remedy). *Cf.* K. DAVIS, ADMINISTRATIVE LAW § 20.21 (Supp. 1982) ("exhaustion is not required when the question of the adequacy of the remedy is identical with the merits of the lawsuit") [hereinafter cited as DAVIS].

26. For example, in Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954), the plaintiff alleged that the statute involved was unconstitutional. The Court, however, explained that it would be premature to decide the question of constitutionality before the administrative prodedures had been exhausted. *Id.* at 553. *See also* Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752 (1947) (litigant cannot circumvent administrative agency by raising constitutional questions). *See generally* DAVIS, *supra* note 25, at 281 ("a court will not decide a constitutional question if there is a possibility an agency may determine the question on nonconstitutional grounds").

27. *See* Mathews v. Eldridge, 424 U.S. 319 (1976) (although exhaustion is statutorily required, the constitutionality of an agency's procedure may be challenged in court before administrative remedies are exhausted). *See also* Fuentes v. Roher, 519 F.2d 379 (2d Cir. 1975) (discharged school superintendent not required to exhaust administrative remedies before bringing constitutional challenge to hearing board's procedures).

28. Because the exhaustion doctrine is a rule of judicial administration, and because the exceptions to the doctrine have been judicially established, the courts retain the responsibility for determining whether exhaustion should be required in any given case. One commentator has suggested that the Supreme Court should clarify the basis for its decisions concerning exhaustion of administrative remedies, rather than maintain the discretion to require exhaustion as it sees fit. *See* K. DAVIS, ADMINISTRATIVE LAW AND GOVERNMENTS 93-94 (1975).

29. When a court determines that exhaustion should be required, it defers exercise of its jurisdiction until administrative remedies have been exhausted. Justice Brennan, concurring in Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981), drew a distinction between renouncing federal court jurisdiction under § 1983 and simply "deferring" that jurisdiction until state administrative remedies have been exhausted. *Id.* at 136 (Brennan, J., concurring). The opinion suggested that a complete displacement of § 1983 remedies could only be justified

complainant is dissatisfied with the agency's decision, the claim may then be pursued in federal court.[30]

Until 1963, courts customarily applied the exhaustion doctrine to cases brought under section 1983.[31] In *McNeese v. Board of Education*,[32] however, the Supreme Court held that exhaustion of state administrative remedies was not required by the statute. The plaintiffs in *McNeese* were students enrolled in a racially segregated school.[33] The students brought suit under section 1983 requesting equitable relief, including registration in an integrated school. The state administrative remedy, which provided that residents of the school district should file complaints with the superintendent, was not exhausted by the plaintiffs.[34]

In support of its decision that exhaustion of administrative remedies was not a prerequisite to suit under section 1983, the *McNeese* Court cited its earlier decision in *Monroe v. Pape*.[35] Although *Monroe* involved only state

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by a strong showing of congressional intent or the existence of persuasive policy considerations. *Id.* The deferral of federal court jurisdiction that results when exhaustion of administrative remedies is required, Justice Brennan concluded, could be more easily justified. *Id.*

30. The exhaustion doctrine is based on the assumption that many disputes can be resolved at the administrative level, thus abolishing the need for federal court intervention. *See supra* note 17 and accompanying text. Nonetheless, the Supreme Court has stated that there are no res judicata or collateral estoppel effects attached to state administrative decisions. Consequently, federal courts are free to determine the issues should a plaintiff remain dissatisfied after exhausting administrative remedies. *See* Prentis v. Atlantic Coast Line, 211 U.S. 210, 230 (1908) (after exhausting state administrative remedies, plaintiff's subsequent claim in federal court cannot be defeated by a plea of res judicata). *See also* Lane v. Wilson, 307 U.S. 268, 274 (1939) (acknowledging Prentis v. Atlantic Coast Line is still good law, but that it does not apply to state judicial, as opposed to administrative remedies). *See generally Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1272 (1977) (explaining that resort to federal courts remains open after exhaustion of state administrative remedies because principles of res judicata do not attach to agency determination) [hereinafter cited as *Developments*].

A distinction must be noted, however, when review of federal, rather than state, administrative decisions is involved. A federal court usually will accept the factual determinations of the federal administrator, leaving only questions of law open to judicial review. *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) (when Congress places authority in an administrative agency, that agency's determination of the facts should not be overturned simply because the reviewing court might have reached a different conclusion).

31. *See* Lane v. Wilson, 307 U.S. 268 (1939). In *Lane*, the Supreme Court recognized that *administrative* remedies must normally be exhausted before bringing suit in federal court, but state *judicial* remedies need not be exhausted. *Id.* at 274. Subsequent to the decision in *Lane*, lower federal courts generally continued to require exhaustion of administrative remedies in § 1983 cases. *See, e.g.*, Dove v. Parham, 282 F.2d 256 (8th Cir. 1960); Covington v. Edwards, 264 F.2d 780 (4th Cir. 1959); Baron v. O'Sullivan, 258 F.2d 336 (3d Cir. 1958).

32. 373 U.S. 668 (1963).

33. *Id.* at 669.

34. *Id.* at 670.

35. *Id.* at 671 (citing Monroe v. Pape, 365 U.S. 167 (1961)). In *Monroe*, a black man and his family were forced to stand naked in their living room while Chicago police officers ransacked their home. Mr. Monroe was then taken to police headquarters for 10 hours where he was not permitted to call his family or lawyer. He was later released, and no charges were pressed. 365 U.S. at 169. Exhaustion of state judicial remedies was not required even though the Illinois Constitution contained an unreasonable search and seizure clause similar to that in the fourth amendment of the federal Constitution. 365 U.S. at 183-84.

judicial proceedings, rather than administrative remedies, it presented a thorough discussion of the legislative history of section 1983. The *Monroe* Court explained that the statute was originally entitled the Ku Klux Act of April 20, 1871 and was enacted to vest federal courts with jurisdiction to enforce the provisions of the fourteenth amendment.[36] Thus, the Court analyzed the intent of the legislators who originally passed the statute.

In *Monroe*, the Court recognized that the statute created a procedural mechanism for redress of constitutional violations committed under color of state law.[37] Three main legislative purposes for granting the federal courts jurisdiction through section 1983 were identified by the Court.[38] First, the statute was designed to give a remedy for any injury suffered as a result of a state law which is unconstitutional on its face.[39] Second, Congress intended to provide a cause of action in the event that a state remedy inadequately protects constitutional rights.[40] Third, the statute was designed to create a federal remedy where a state remedy may be adequate in theory, but not in practice.[41] Premised on these three central purposes of the statute, the *Monroe* Court inferred a congressional intent to provide concurrent forums, which would allow complainants to choose either state or federal court to effectuate their claims.[42] The majority reasoned that to require ex-

36. 365 U.S. at 171.

37. *Id.* The *Monroe* Court recognized the procedural nature of the statute when it considered the statements made by Senator Edmunds at the time § 1983 originally was passed. *Id.* The Senator commented that the "section is one that I believe nobody objects to . . . it is merely carrying out the principles of the civil rights bill, which has since become part of the Constitution." CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871). Federal courts have adhered to the view that § 1983 creates procedural, rather than substantive rights. *See, e.g.*, Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979) ("[s]tanding alone, § 1983 clearly provides no protection for civil rights since . . . § 1983 does not provide any substantive rights at all"); LeBoeuf v. Ramsey, 503 F. Supp. 747, 754 (D.C. Mass. 1980) (§ 1983 is a remedial provision creating no substantive rights).

38. *See* 365 U.S. at 173. The *Monroe* Court inferred these three main purposes from an examination of the legislative history of § 1983 in its entirety. *Id.* The Court specifically considered a letter sent from President Grant to the Congress, which explained the serious state of affairs existing in the southern states at the time. *Id.* at 172-73. The President expressed the belief that the life, liberty, and property of some citizens were not secure, that state authorities lacked the power to correct the evils, and therefore, that legislation should be passed which would secure the enforcement of laws in all parts of the United States. *See* CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871).

39. 365 U.S. at 173. In opposition to the bill, however, Representative Sloss maintained that its purpose was "unclear" because advocates of the bill did not suggest that any state had passed an unconstitutional law. *See* CONG. GLOBE, 42d Cong., 1st Sess. app. at 268 (1871).

40. 365 U.S. at 173. During legislative debate, Senator Sherman alleged that blacks could not testify against whites in Kentucky, therefore, the state court remedies were inadequate to protect the constitutional rights of blacks. CONG. GLOBE, 42d Cong., 1st Sess. 345 (1871).

41. 365 U.S. at 174. An example of remedies adequate in theory, but not in practice, can be seen in southern states that instituted laws against discrimination on the basis of race, but simply were not powerful enough or did not have the desire to prevent the unconstitutional actions of the Ku Klux Klan. *See* CONG. GLOBE, 42d Cong., 1st Sess. 428 (1871) (Representative Beatty stated that the equal protection of the laws was denied citizens in certain states because of the states' lack of power or inclination to uphold the Constitution).

42. 365 U.S. at 183. In *Monroe*, the Court ultimately determined that Congress intended

haustion of state judicial remedies would defeat the purposes of the statute.[43]

After considering the legislative history of section 1983 as articulated in *Monroe*, the *McNeese* Court discerned that to require a plaintiff bringing a claim in federal court to "attempt to vindicate the same claim in a state court" would defeat the purposes of the statute.[44] Exhaustion of state administrative remedies was specifically addressed, however, when the *McNeese* Court explained that the available remedy was inadequate to protect constitutional rights because the administrative body involved lacked authority to grant the requested relief.[45] The inadequacy of the administrative remedy provided by the state constituted a traditional exception to the exhaustion doctrine.[46] Therefore, the *McNeese* opinion concluded that resort to state administrative proceedings is not necessary when such proceedings offer only tenuous protection.[47] It remained unclear, however, whether the Court had established a rigid no-exhaustion rule under section 1983, or simply invoked a traditional exception to the doctrine.

In several subsequent cases, the Supreme Court disposed of the exhaustion question by simply referring to *McNeese*. In *Damico v. California*,[48] for example, the plaintiffs directly challenged the constitutionality of a state statute. The Court did not recognize that such a challenge constituted a traditional exception to the exhaustion doctrine.[49] Instead, the Court issued a

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to provide plaintiffs with a federal remedy supplementary to the state remedy. *Id.* It has been argued, however, that the Court was incorrect in assuming that the federal courts would provide a supplemental remedy in all cases. It has been suggested that perhaps Congress wanted to provide a federal remedy only where the state remedy is inadequate in theory or in practice. This view of the statute is more consistent with the three main purposes of § 1983 as set forth in *Monroe*, which all necessitate a determination of whether the available state remedy is adequate. *See* Note, *Limiting The Section 1983 Action In The Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1490 (1969) (suggesting that an expansive reading of a supplemental federal remedy so broadens the scope of § 1983 as to make the section's latter two purposes redundant).

43. 365 U.S. at 183. If the Court had required exhaustion of state judicial remedies, federal court jurisdiction would have been defeated for all practical purposes because of the res judicata effect of state court decisions. *See supra* notes 30-31.

44. *McNeese*, 373 U.S. at 672.

45. *Id.* at 674-75 ("it is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights").

46. *Id.* at 675. The *McNeese* Court explained that under state law, petitioners could file a complaint alleging discrimination only if they first obtained subscription of 50 residents or 10% of the school district. *Id.* Furthermore, the superintendent did not have the authority to order corrective action, but could only make a recommendation that the attorney general bring suit to enjoin further discrimination. Should the Attorney General decide to file suit, the superintendent's findings would not be binding on any court or executive officer. *Id.* At best, a favorable decision by the superintendent could lead to a suit in state court. Because a state judicial remedy need not be exhausted as a prerequisite to suit in federal court, the Court reasoned that it would be anomalous to hold that this inadequate administrative remedy must be exhausted before bringing the federal action. *Id.*

47. *Id.* at 676.

48. 389 U.S. 416 (1967) (per curiam).

49. For cases holding that no exhaustion is required when the constitutionality of an administrative proceeding is directly challenged, see *supra* note 27.

one page per curiam opinion summarily concluding that based on *McNeese*, the federal district court had improperly dismissed the action for failure to exhaust administrative remedies.[50] One year later, in *King v. Smith*,[51] the Court disposed of the exhaustion issue in a footnote stating that under section 1983, a plaintiff "is not required to exhaust administrative remedies, where the constitutional challenge is sufficiently substantial, as here, to require the convening of a three judge court."[52] Similarly, in *Houghton v. Shafer*,[53] the Court recognized that to require exhaustion of the particular administrative remedy would be futile.[54] Although the Court made seemingly catagorical statements in each of these cases that section 1983 does not require exhaustion of administrative remedies, the possible alternative interpretations of each led many commentators and lower federal courts to conclude the Supreme Court was not adopting a rigid no-exhaustion rule.[55]

Courts that did not interpret the Supreme Court opinions as establishing a rigid no-exhaustion rule applied the traditional exhaustion doctrine to actions brought under section 1983.[56] Consequently, these courts continued to

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50. 389 U.S. at 417 (the Court cited *McNeese* as controlling without mentioning that in that case, the available administrative remedy could only be enforced through state judicial action and, therefore, clearly was inadequate). The cursory consideration the Court gave to the exhaustion question in *Damico* led one commentator to remark, "[p]rior to [*Damico*], the Supreme Court's treatment of the exhaustion requirement had been inconclusive. [When] the need for exhaustion was again urged upon the Court in [*Damico*], it was rejected summarily. Surprisingly, the question was treated as one governed by settled law." Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1201-02 (1968).

51. 392 U.S. 309 (1968).

52. *Id.* at 312 n.4. The *King* Court did not discuss the adequacy of the available remedy because plaintiffs directly challenged the constitutionality of the state welfare procedures. *Id.* In both *Damico* and *King*, it was beyond the authority of the agency involved to award the remedy requested, thus, the administrative remedies were clearly inadequate. *See also* Carter v. Stanton, 405 U.S. 669 (1972) (per curiam) (administrative remedies inadequate, thus, exhaustion not required under § 1983).

53. 392 U.S. 639 (1968) (per curiam).

54. *Id.* at 642.

55. Two additional cases contributed to the position of some courts and commentators that the Supreme Court did not intend to establish a rigid no-exhaustion rule. In Barry v. Bachi, 443 U.S. 55 (1978), the majority did not impose a rigid no-exhaustion rule, but instead, based its refusal to require exhaustion on one of the traditional exceptions to the exhaustion doctrine. *Id.* at 63 n.10. The *Barry* Court, quoting Gibson v. Berryhill, 411 U.S. 564, 575 (1973), explained that exhaustion is not required if, for all practical purposes, the merits of the lawsuit are identical to the question of the adequacy of the administrative remedy. 443 U.S. at 63 n.10. For a citation of decisions by the United States Courts of Appeals which did not interpret Supreme Court precedent as creating a rigid no-exhaustion rule, see *supra* note 7. *See also Developments*, *supra* note 30, at 1274 (in all cases in which the Supreme Court ruled that no exhaustion was required, the available remedies were inadequate and exhaustion would not have been required under the traditional doctrine); *Exhaustion in Section 1983 Cases*, *supra* note 17, at 543 (every case in which the Supreme Court failed to require exhaustion involved situation in which exhaustion would not have been required under traditional exhaustion principles).

56. For a discussion of traditional exhaustion doctrine, see *supra* notes 16-20 and accompanying text.

consider the adequacy of the administrative remedy available in each case.[57] This flexible approach to the exhaustion question had been adopted in five circuits.[58] Because the remaining six circuits adhered to a strict no-exhaustion rule, however, the Supreme Court reconsidered the exhaustion question in *Patsy v. Board of Regents*.[59]

THE *PATSY* DECISION

Facts and Procedural History

Georgia Patsy, a white female, was a secretary at Florida International University.[60] She was denied thirteen promotions for which she applied at the University, although she contended she was qualified for these positions. Patsy maintained that the University's practice of segregating applicants' files on the basis of race and sex resulted in her continuous rejection.[61] By separating files to facilitate the hiring and promoting of individuals from minority groups, Patsy alleged that the University engaged in a pattern and practice of discrimination in violation of the Constitution and laws of the United States.[62]

Patsy filed suit under section 1983 in Federal District Court for the Southern District of Florida.[63] She requested injunctive and declaratory relief in the form of a promotion, or in the alternative, the sum of $500,000 as actual and exemplary damages.[64] The defendant, Board of Regents, moved to dismiss the action based on Patsy's failure to exhaust the available administrative remedies available at the state level.[65] The district court granted the defendant's motion.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit reversed and remanded the case. On rehearing, however, the court of appeals, sitting en banc, vacated the panel's decision.[66] The full court determined that although the United States Supreme Court had held in

57. For situations in which a remedy may be determined inadequate, see *supra* notes 21-27 and accompanying text.

58. *See, e.g.*, Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir. 1969). In *Eisen*, the court did not discern that the Supreme Court had established a rigid no-exhaustion rule under the Civil Rights Act. Rather, the *Eisen* court read the Supreme Court decisions as merely condemning a "wooden" application of the exhaustion doctrine under § 1983. *Id. See also supra* note 7.

59. _____ U.S. _____ , 102 S. Ct. 2557 (1982).

60. Patsy v. Florida Int'l Univ., 634 F.2d 900, 902 (5th Cir. 1981), *rev'd*, 102 S. Ct. 2557 (1982).

61. *Id.*

62. *Id.*

63. 102 S. Ct. 2557, 2559 (1982).

64. *Id.*

65. 634 F.2d 900, 913-14 (1981). According to the Board of Regents, the State University System provided several administrative avenues of relief, none of which were pursued by the plaintiff. The administrative remedies, however, were not considered in detail because the plaintiff did not challenge the adequacy of the available remedies. Rather, plaintiff contended exhaustion of administrative remedies is never required under § 1983. *Id.*

66. *Id.*

previous cases that exhaustion was not required under section 1983, prior holdings did not preclude the adoption of a flexible exhaustion rule.[67] Subsequently, the United States Supreme Court reversed the decision of the court of appeals.[68]

The Court's Rationale

The *Patsy* Court held that exhaustion of state administrative remedies could not be required as a prerequisite to bringing an action in federal court pursuant to section 1983.[69] Although the Court based its decision on the legislative histories of both section 1983 and section 1997e, prior case law briefly was considered. The Court acknowledged that many of its prior decisions could have been based on the traditional exceptions to the exhaustion doctrine,[70] however, the Court engaged in no detailed discussion of precedent. Rather, articulating its position that Congress has vested federal courts with the paramount duty to protect constitutional rights, the Court explained that no exhaustion of state remedies is required. According to the *Patsy* majority, the Court had not deviated from this postion since its decision in *McNeese*.[71]

The Court acknowledged that an exhaustion requirement may be imposed judicially in cases where Congress has not explicitly required exhaustion.[72] When the Court judicially requires exhaustion of administrative remedies, it defers the jurisdiction granted to it by Congress.[73] Therefore, although the Court plays an important role in determining whether exhaustion should be imposed, the *Patsy* Court declared that the Court should not defer its jurisdiction unless to do so would be consistent with congressional intent.[74]

Prefacing its discussion of the congressional intent behind section 1983, the Court explained that the Congress in 1871 did not expressly contemplate the exhaustion of administrative remedies.[75] Rather, because federal courts

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67. *Id.* at 908. The court of appeals also set out minimum conditions which must be met before exhaustion could be required. To be considered adequate, an administrative remedy must provide for: interim relief in cases where it is necessary to prevent irreparable injury, relief which is commensurate with the claim, an orderly system of review including relief within a reasonable time, and fair procedures which are not unduly burdensome and which are not used to harass complainants. *Id.* at 912-13.

68. 102 S. Ct. at 2559.

70. *Id.* at 2560.

71. *Id.* The Court quoted from Steffel v. Thompson, 415 U.S. 452 (1974), where it had stated that exhaustion is not a prerequisite to suit under § 1983. *Id.* at 2560. Because *Steffel* considered whether declaratory relief is precluded when a state prosecution has been threatened but is not pending, however, the language quoted is merely dictum.

72. 102 S. Ct. at 2560-61.

73. *Id.* at 2561 n.4 ("the role of the state agency becomes important once a court finds that deferring its jurisdiction is consistent with congressional intent"). For a more detailed explanation of why the exhaustion requirement can be characterized as a temporary deferral of jurisdiction, see *supra* note 29.

74. 102 S. Ct. at 2561.

75. *Id.* The Court explained that the precursor to § 1983 was § 1 of the Civil Rights Act

stand as the prime guarantors of federal rights, the Court found that Congress had intended to provide complainants with an immediate federal remedy when their constitutional rights alledgedly were violated.[76] The majority explained that Congress enacted section 1983, in part, as a result of the legislators' distrust in the states' abilities to protect constitutional rights. More specifically, the fact-finding processes of the state courts were inadequate because such courts were susceptible to prejudice.[77] Finally, the Court explained, as it had in *Monroe v. Pape*, that section 1983 has been interpreted to provide dual or concurrent jurisdiction in the state and federal courts.[78]

After discussing the debates over passage of the Civil Rights Act of 1871,[79] the predecessor to section 1983, the Court recognized that it would be "somewhat precarious" to render its decision concerning exhaustion of administrative remedies premised soley on this legislative history. When the Civil Rights statute was passed in 1871, administrative agencies had not developed to the extent of present day agencies, and the Reconstruction Congress was not aware of the role these agencies would assume one hundred years in the future.[80] Thus, the *Patsy* Court sought further support for its decision by examining a more recent expression of congressional intent.

In 1980, Congress enacted the Civil Rights of Institutionalized Persons Act.[81] This statute vests the United States Attorney General with the authority to uphold the rights of institutionalized persons by granting him standing to sue on their behalf.[82] Section 1997e of the Act, however, requires that

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of 1871. Although the 1871 Congress did not specifically contemplate whether exhaustion should be required, the *Patsy* Court believed that the "tenor" of the debates could be studied to reveal congressional intent. 102 S. Ct. at 2561.

76. *Id.* The Court quoted Representative Dawes as expressing the view that there is no tribunal better fitted to adjudicate the rights, privileges, and immunities which are granted by the Constitution, than the courts of the United States. CONG. GLOBE, 42d Cong., 1st Sess. 476 (1871).

77. 102 S. Ct. at 2563. The Court maintained that although deference is often given to the superior fact-finding ability of an administrative agency, the suspicion that the 1871 Congress felt for the juries and state courts of the time indicated exhaustion should not be required. *Id.*

78. *Id.*

79. *See* Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871) (codified as 42 U.S.C. § 1983 (1976 & Supp. III 1979)). Section 1983 remains virtually unchanged from the original Act. *See supra* note 5.

80. 102 S. Ct. at 2563-64. Although the 1871 Congress had not considered the exhaustion question, the *Patsy* Court concluded that "it seems fair to infer that the 1871 Congress did not intend that an individual be compelled in every case to exhaust state administrative remedies before filing an action under § 1 of the Civil Rights Act." *Id.* at 2563.

81. 42 U.S.C. §§ 1997a-1997e (Supp. IV 1980).

82. Section 1997a provides:

> Whenever the Attorney General has reasonable cause to believe that any State . . . or other person acting on behalf of a State . . . is subjecting persons residing in or confined to an institution . . . to flagrant conditions which deprive such persons of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm,

before the Attorney General may sue on behalf of adult prisoners bringing civil rights actions under section 1983, state administrative remedies must be exhausted in certain limited circumstances.[83]

The legislative history of section 1997e reveals Congress' recognition that the Court generally has not required exhaustion of state administrative remedies under section 1983.[84] Therefore, the *Patsy* Court concluded that by expressly adopting an exhaustion provision in section 1997e, Congress intended to carve out a narrow exception to the Court's no-exhaustion rule.[85] Because Congress, after recognizing that the Court did not require exhaustion under section 1983, had adopted a specific exhaustion requirement in the Civil Rights of Institutionalized Persons Act, the Court inferred congressional approval of the general no-exhaustion rule.[86] The Court maintained that it would be inconsistent with the intent of Congress to allow judicial imposition of an exhaustion requirement in a section 1983 case.[87] In other words, the specific exhaustion provisions of section 1997e would be superfluous if the judiciary possessed the discretion to require exhaustion in any case.

After concluding that Congress did not intend that federal courts require exhaustion before hearing section 1983 cases, the *Patsy* Court discussed the policy arguments relied on by the lower court.[88] Even if policy considerations indicated the exhaustion doctrine should be applied, the Court reasoned that difficult issues concerning when and how to require the exhaustion would arise.[89] Congress, the *Patsy* Court proclaimed, possesses superior

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> . . . the Attorney General, for or in the name of the United States, may institute a civil action in any appropriate United States district court. . . .

Id. § 1997a.

83. *Id.* § 1997e. The specific provisions of the exhaustion scheme of § 1997e require the Attorney General to develop standards which will facilitate the states' development of adequate agencies. If a state believes that it has developed an adequate administrative agency, it may request that the Attorney General approve the state system by granting it certification. If certification is granted, a court should require exhaustion of the state administrative remedy unless the court determines that exhaustion would not be "appropriate in the interest of justice." *Id.*

84. For example, during the debates on § 1997, Representative Wiggins stated: "it is settled law that an exhaustion of administrative remedies is not required as a precondition of maintaining a 1983 action." 124 CONG. REC. 23, 180 (1978).

85. 102 S. Ct. at 2564. The Court states that "Congress understood that exhaustion is not generally required in section 1983 actions, and that it decided to carve out only a narrow exception to this rule." *Id.*

86. *Id.* at 2565.

87. *Id.*

88. *Id.* at 2566. The *Patsy* Court considered the Fifth Circuit's contention that conservation of judicial resources and utilization of agency expertise are important concerns in the context of § 1983. The Court noted that additional policy considerations exist when state, rather than federal agencies are involved. The goal of comity and federal-state relations might be improved if a federal court were to defer its review until the state agency had an opportunity to hear the complaint. *Id.*

89. *Id.* at 2567. Questions that would have to be resolved include how to unify standards for determining whether a certain state agency's remedy is adequate, how the statute of limitations should be applied, and whether there would be any collateral estoppel effect of administrative findings. *Id.*

institutional competence to resolve these problems; consequently, the Court was not in a postition to suggest that Congress adopt exhaustion schemes for all section 1983 cases.[90] Thus, the Court resolved that the "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to section 1983."[91]

CRITICISM

In *Patsy*, the Court summarily discussed precedent. The Court disposed of the argument that it had not given the exhaustion question full consideration in prior cases by stating "[t]his contention need not detain us long."[92] The Court then merely cited the cases in which it had not required exhaustion of state administrative remedies.[93] No critical consideration of the reasoning set forth in these opinions was attempted. An examination of the cases relied on by the Court, however, reveals that those cases had not given plenary consideration to the propriety of requiring exhaustion under section 1983.

The *Patsy* Court's list of precedent began with *McNeese*.[94] In *McNeese*, the only discussion concerning exhaustion of administrative remedies focused on the inadequacy of the particular remedy available to the plaintiffs.[95] Inadequate administrative remedies need never be exhausted, however, even under the traditional exhaustion doctrine.[96] Although the Court had previously stated the reasons for refusing to require exhaustion of state judicial remedies,[97] the *McNeese* Court failed to recognize the distinction between requiring exhaustion of state administrative as opposed to judicial remedies.[98]

In cases decided after *McNeese*, the Supreme Court continued to blur the distinctions between requiring exhaustion of state administrative and judicial remedies. Rather than engaging in a discussion concerning whether the ex-

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90. *Id.* at 2567-68.

91. *Id.* at 2568.

92. *Id.* at 2560.

93. For a citation of these cases, see *supra* note 6.

94. 102 S. Ct. at 2560. For a discussion of subsequent cases which relied on *McNeese*, see *supra* text accompanying notes 48-55.

95. 373 U.S. 668, 674-76 (1963). If the *McNeese* Court had intended to follow a rigid no-exhaustion rule, its thorough discussion of the inadequacy of the available remedy was superfluous. The concluding statement in *McNeese*—that when federal rights are subjected to *tenuous* protection no exhaustion is required—indicates that the Court considered the inadequacy of the remedy relevant to its decision.

96. For a discussion of cases in which courts have found the available remedies inadequate and not required exhaustion, see *supra* notes 23-27 and accompanying text.

97. *Monroe*, 365 U.S. at 167 (1961).

98. Prior to *McNeese*, the distinction between requiring exhaustion of state administrative, as opposed to state judicial remedies was well defined. *See supra* note 31 and accompanying text. Discussion of the distinction, however, was conspicuously absent from *McNeese*.

Even after *McNeese*, the Supreme Court made it clear that exhaustion of state administrative proceedings must not be confused with exhaustion of state judicial remedies, as required by the abstention doctrine. *See* Gibson v. Berryhill, 411 U.S. 564, 574 n.13 (1973).

haustion of administrative remedies should be required as a general rule, the Court simply relied on the inadequacy of the administrative remedy involved.[99] These cases failed to articulate that requiring exhaustion of administrative remedies differs from exhaustion of judicial remedies in that no res judicata effect attaches to an agency decision, and thus, an agency decision constitutes only a temporary deferral of jurisdiction.[100]

Additionally, the Court has refused to recognize that the traditional reasons federal courts developed the administrative exhaustion doctrine apply in the context of section 1983 actions. State governments have an interest in the efficient administration of their governmental structures.[101] Indeed, the Supreme Court has recognized that the autonomous nature of state administrative agencies may contribute to their abilities to discover and correct their own errors.[102] By developing systems designed to cope with specific administrative concerns, states may benefit from the expertise gained by officials and develop a heightened sensitivity to protecting federal rights.[103] Furthermore, the exhaustion doctrine provides for immediate judicial consideration of a case when administrative remedies are inadequate or unavailable.[104]

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99. For example, in Gibson v. Berryhill, 411 U.S. 564 (1973), the plaintiff was directly challenging the constitutionality of the administrative remedy which he was afforded. *Id.* at 575. In explaining that there was no requirement to exhaust a remedy directly challenged as inadequate, the Court stated that the question remained open as to whether § 1983 plaintiffs could ever be required to exhaust administrative remedies. *Id.* at 574. The Court explained that certain state administrative remedies had been deemed inadequate on a variety of grounds, including delay by the agency and doubt as to whether the agency was empowered to grant effective relief. *Id.* at 574 n.14. Justice Marshall, realizing the significance of the majority's implication, wrote a one paragraph concurrence. He joined the Court's opinion "except insofar as it suggests that the question remains open whether plaintiffs in some suits brought under 42 U.S.C. § 1983 may have to exhaust administrative remedies." *Id.* at 581 (Marshall, J., concurring). *See also supra* notes 48-55 and accompanying text.

100. *See supra* notes 29-30 and accompanying text.

101. *See generally* Comment, *Exhaustion of State Remedies Under The Civil Rights Act*, 68 COLUM. L. REV. 1201, 1206 (1968) (there is a strong state interest in the establishment of comprehensive schemes of regulation, and perhaps more importantly, in providing a means by which the victim of official misconduct can obtain relief without putting the state to the expense and effort of a trial in federal court).

102. *See supra* note 19 and accompanying text.

103. *See supra* note 18 and accompanying text.

104. Inherent in the characterization of the exhaustion doctrine as a "flexible" rule of judicial administration, is the important concept that the court retains the power to determine, in the first instance, whether the available administrative remedy is adequate and to refuse to require exhaustion if it is not. *See supra* notes 23-27 and accompanying text.

Although the state may have an important interest in seeing that the adequate administrative remedies it provides are utilized by plaintiffs, one commentator has argued that the state's interest in having its *judicial* remedies exhausted is negligible. *See Exhaustion In Section 1983 Cases, supra* note 17, at 547 n.54. Theoretically, state and federal judicial remedies are interchangeable. Thus, federal law will be applied, and the state will be forced to spend time and money defending itself in a judicial proceeding regardless of whether the judicial forum is state or federal. Furthermore, plaintiffs have a strong interest in bypassing state judicial remedies which may have res judicata effect in a subsequent federal proceeding. *Id.*

Despite these crucial distinctions between requiring exhaustion of state administrative and state judicial remedies, the *Patsy* Court, without a critical examination, presumed that a rigid no-exhaustion rule had been established in prior cases. The Court indicated that it would be forced to overrule these prior decisions if it were to impose the traditional exhaustion doctrine in a section 1983 action.[105] If the *Patsy* Court had engaged in a critical analysis of precedent, it could have reached the conclusion that its earlier decisions were based on traditional exceptions to the exhaustion doctrine and not on a rigid no-exhaustion rule.[106] Such an analysis would have preserved section 1983 protection for plaintiffs in the event that no adequate administrative remedies were available, yet permitted federal courts to defer hearing cases when adequate and appropriate state agencies were available.[107]

Rather than conducting a detailed analysis of precedent, the majority in *Patsy* engaged in an extensive reconsideration of the legislative history of section 1983. In its discussion of the statute, the Court relied on compelling statements made by supporters and opponents of the Civil Rights Act of 1871. The Court recognized that Congress placed the utmost faith in the federal judiciary's ability to guard constitutional rights.[108] Therefore, the *Patsy* Court deduced that in passing the Civil Rights Act, the Forty-second Congress vested jurisdiction in the federal courts to redress violations of the fourteenth amendment.[109]

For reasons of sound judicial administration, however, the federal courts may defer consideration of questions over which they clearly have jurisdiction.[110] In fact, the exhaustion doctrine is often judicially imposed.[111]

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105. 102 S. Ct. at 2560. Although the Court did reconsider legislative history in *Patsy*, the Court's partial reliance on stare decisis may have more significance than initially seems apparent. To justify overruling its earlier decisions, a particularly strong showing that the Court previously misconstrued legislative intent may have been necessary. *See* Patsy v. Board of Regents, 102 S. Ct. 2557, 2569 (1982) (White, J., concurring).

106. For citations to authorities that placed this interpretation on Supreme Court cases, see *supra* note 55 and accompanying text.

107. For reasons underlying the exhaustion doctrine and methods by which the traditional exceptions to the doctrine secure plaintiffs' rights, see *supra* notes 16-27 and accompanying text.

108. *See supra* note 76 and accompanying text.

109. 102 S. Ct. at 2563. *See supra* notes 36-37 and accompanying text.

110. 102 S. Ct. at 2560-61. The Court acknowledged this fact by stating that it "may impose [an exhaustion] requirement even where Congress has not expressly so provided." *Id.* Courts often defer jurisdiction granted to them by Congress. *See supra* text accompanying notes 16-20. For example, as early as 1904, the Court in United States v. Sing Tuck, 194 U.S. 161 (1904), held that plaintiffs must exhaust administrative remedies, stating that "even fundamental questions must be determined in an orderly way." 194 U.S. at 168. The judicially imposed exhaustion requirement invoked in *Sing Tuck* was subsequently adopted by statute. *See* 8 U.S.C § 1105a(c) (1976). For a further discussion of judicially imposed exhaustion, see B. SCHWARTZ, ADMINISTRATIVE LAW 499 (1976).

111. Even under § 1983, the federal courts have, on occasion, chosen not to exercise jurisdiction when important state interests are involved. *See, e.g.*, Juidice v. Vail, 430 U.S. 327 (1977) (*Younger* principles of comity extended to civil matters); Younger v. Harris, 401 U.S. 37 (1971) (to enjoin a pending state court proceeding would be a serious interference with state court prerogatives). *Cf.* Preiser v. Rodriquez, 411 U.S. 475 (1973) (prisoner not permitted to bring

Consequently, although the *Patsy* Court's recognition that the federal court has jurisdiction over actions brought under section 1983 is correct, it is not determinitive of whether the court should temporarily defer that jurisdiction.

The Court further perceived that Congress had concluded that the federal courts were more capable of protecting constitutional rights than state authorities and local courts.[112] Undoubtedly, members of Congress believed that state courts may be more susceptible to local prejudice which could result in defective fact-finding processes.[113] This belief, however, does not necessarily argue against requiring exhaustion of state administrative remedies which have been determined by the judiciary to be adequate. Because state administrative findings would not be binding on a federal court,[114] the federal court would be free to make its own determination should a plaintiff remain dissatisfied with the state agency's decision.

After recognizing that Congress displayed great trust in the federal judiciary, and that Congress did not consider the exhaustion issue directly, the *Patsy* Court ironically interpreted section 1983 as restricting judicial power to require exhaustion. There are some indications, however, that the legislature would not have disapproved of a flexible exhaustion requirement. For example, the very language quoted in *Patsy* to support the rigid no-exhaustion rule could have been interpreted differently. When introducing the Civil Rights Act of 1871, Senator Edmunds stated that Congress had the duty "to secure to the individual, in spite of the State, *or with its aid*, as the case might be, precisely the rights that the Constitution gave him. . . ."[115] Inherent in the Senator's remarks was a congressional understanding that states could aid in securing constitutional rights. Given this understanding, the *Patsy* Court reasonably could have held that Congress did not intend to advocate circumvention of adequate state administrative remedies which subsequently might be developed.

Furthermore, the *Patsy* Court could have interpreted the language em-

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an action under § 1983 for unconstitutional denial of good time credits; instead, must first use habeas corpus and exhaust all state remedies).

112. 102 S. Ct. at 2562.

113. *See supra* note 77 and accompanying text. Although Congress expressed deep concern about state prejudice which was apparent immediately after the Civil War, arguably, this concern is not as justified today. Nevertheless, it was the Reconstruction Congress' fear of state prejudice upon which the *Patsy* Court relied in construing § 1983 to be an exception to the exhaustion doctrine.

114. *See supra* note 30 and accompanying text.

115. CONG. GLOBE, 42d Cong., 1st Sess. 692 (1871)(emphasis added). Senator Edmunds referred to the Supreme Court decision in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). In that decision, the Court held that the Constitution, as it was in 1842, required that slaves escaping from service must "be delivered up, on claim of the person to whom such service or labour may by due." *Id.* at 611. Therefore, the Court maintained that it was the duty of Congress to secure a slave owner's constitutional right to his "property". *Id.* This case was cited by Senator Edmunds to explain that Congress had the duty to pass legislation which secured constitutional rights. CONG. GLOBE, 42d Cong., 1st Sess. at 692.

bodied in section 1983 as consistent with a flexible exhaustion doctrine. The statute provides for redress in an action at law, suit in equity, "or other proper proceeding for redress."[116] Implicitly, the language suggests that Congress percieved that some proceeding may be determined adequate other than a suit originating in federal court. Indeed, the express wording of the statute is consistent with allowing a judicial determination of the adequacy of state administrative proceedings.[117] Nevertheless, after considering the legislative history of the Civil Rights Act, the Court conceded that there is no evidence which conclusively determines how the Forty-second Congress would have resolved the question of exhaustion of administrative agencies.[118] In 1871, Congress obviously could not predict the significant role that administrative agencies would assume in the modern day legal system. As a result, the Court relied on the perceived intent of the Ninety-sixth Congress in its enactment of section 1997.

Section 1997 enables the United States Attorney General to bring civil rights actions on behalf of institutionalized persons.[119] Through the provisions of section 1997e, Congress instructed that before a section 1983 action may be instituted by the Attorney General on behalf of adult prisoners, exhaustion of adequate state administrative remedies is required.[120] In passing this narrow requirement, Congress did not consider the wisdom of an exhaustion rule for other section 1983 suits.[121] Nonetheless, the majority in *Patsy* considered it appropriate to rely on the legislative history of this new statute to ascertain whether section 1983 required exhaustion of state remedies. The *Patsy* Court erroneously concluded that Congress would not approve of the traditional exhaustion doctrine in section 1983 actions, simply because it statutorily imposed a specific exhaustion requirement in section 1997e.[122]

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116. For text of statute, see *supra* note 5.

117. In *Patsy*, the Board of Regents argued that the flexible exhaustion rule was proper according to the *express* language of § 1983. Brief for Respondent at 22-24, Patsy v. Board of Regents, 102 S. Ct. 2557 (1982).

118. 102 S. Ct. at 2563-64.

119. For further explanation of this statute, see *supra* notes 82-83 and accompanying text.

120. 42 U.S.C. § 1997a (Supp. IV 1980). Congress authorized the Attorney General to establish minimum standards which must be met before a state agency could be certified, and therefore be considered "adequate". If the state administrative system has not been certified by the Attorney General, the federal court would determine the adequacy of the agency's remedy. H.R. REP. No. 80, 96th Cong., 1st Sess. 25 (1979).

121. *See supra* note 14. In his dissent, Justice Powell, joined by Chief Justice Burger, argued that the majority improperly relied on § 1997e because the legislation addressed such a narrow class of cases. 102 S. Ct. at 2578 (Powell, J., dissenting).

122. The *Patsy* majority believed that the exhaustion requirement of § 1997e, which applies only to adult prisoners bringing actions under § 1983, would be superfluous if the court could impose exhaustion judicially. 102 S. Ct. at 2566. A close examination of the legislative history, however, demonstrates that Congress did not intend to restrict the Court's ability to require exhaustion. For example, if the Attorney General grants any state agency a certification, and subsequently determines that the agency does not comply with minimum standards, the statute commmands him to revoke the certification. During legislative debate, however, it was stated that even if the Attorney General revokes certification of a system, a federal court remains

After considering the legislative history of section 1997e, the *Patsy* Court proclaimed that if Congress were to determine that an exhaustion requirement was appropriate in all section 1983 cases, such a requirement could be instituted legislatively.[123] The majority explained that Congress possessed superior institutional competence to make such policy decisions.[124] Relying on this competence, the Court declined to alter what it perceived as a procedural framework established by Congress for bringing actions under section 1983.[125]

The flaw in the majority's position lies in its characterization of how the rigid no-exhaustion rule originally was established in section 1983 cases. During the debates preceeding the passage of section 1997e, Congress continually referred to the no-exhaustion rule as if the Supreme Court, not the legislature, had established the rule. For example, one witness testifying before Congress, explained that the Court generally had not required exhaustion under section 1983,[126] and thus, congressional imposition of an exhaustion rule in section 1997e would "seem inconsistent with the Supreme Court's positions."[127] Similarly, Representative Drinan stated that "the Supreme Court

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free to make its own determination that the agency is adequate. 124 CONG. REC. 23,180 (daily ed. July 28, 1978) (statement of Rep. Kastenmeier).

123. 102 S. Ct. 2567. The Court is correct, of course, that an exhaustion requirement could be legislatively adopted just as it was under § 1997e. Nevertheless, simply because the legislature has been silent with respect to exhaustion under § 1983 generally, the Court should not have assumed that the legislature would approve of a rigid no-exhaustion rule. This argument is strengthened when one considers the number of times Congress has been asked specifically to consider a § 1983 exhaustion requirement. Several bills have been introduced into Congress which would prevent courts from requiring exhaustion under § 1983. For instance, as late as Nov. 6, 1979, Senator Mathias introduced a bill which provided "that the doctrine of exhaustion of State judicial and administrative remedies [is] inapplicable in section 1983 suits." S. 1983, 96th Cong., 1st Sess., 125 CONG. REC. 15,991-96 (1979). This bill died in committee, as did several similar bills which had been previously introduced. For similar proposals, see H.R. 7520, 95th Cong., 1st Sess., 123 CONG. REC. 10,834 (1977); H.R. 5535, 95th Cong., 1st Sess., 123 CONG. REC. 8743 (1977); S. 35, 95th Cong., 1st Sess., 123 CONG. REC. 554 (1977); H.R. 549, 95th Cong., 1st Sess., 123 CONG. REC. 356 (1977). In short, Congress has failed to either legislatively require or prevent exhaustion under § 1983.

124. 102 S. Ct. at 2567. In explaining why the policy decisions involved are so difficult to make, the Court stated that there is disagreement over whether judicial or administrative remedies offer the swiftest, least costly, and most reliable relief. Also, the Court questioned whether the expertise of administrative judges in a given area is as important as the federal courts' expertise when considering constitutional questions. *Id.*

It must be noted that these considerations are not new. The same questions must be asked each time the federal court determines whether to require exhaustion of an administrative remedy in areas other than § 1983. Yet, the Court does require exhaustion in these areas where Congress has not required it statutorily. *See supra* note 72 and accompanying text.

125. 102 S. Ct. at 2568.

126. *See Civil Rights of Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 69 (1977) (statement of Jay Lawrence Lichtman, Esq., Deputy Director, Defender Division National Legal Aid and Defender Association) [hereinafter cited as 1977 *Hearings*].

127. *Id.* at 77. After discussing *McNeese*, Mr. Lichtman qualified his statements by explain-

has consistently refused to . . . require exhaustion of remedies.''[128] Nonetheless, Congress chose to include an exhaustion provision in the new legislation. The very fact that during debates Congress found it necessary to determine whether exhaustion is judicially required under section 1983, casts doubt on the Court's characterization of the no-exhaustion rule as part of a procedural framework established by Congress.[129]

During the debates over passage of section 1997e, legislators and experts cited the Court's opinion in *McNeese* to demonstrate that exhaustion is not necessarily required under section 1983.[130] While Congress relied on earlier opinions of the Supreme Court to determine whether exhaustion was required, the Court in *Patsy* circuitously relied on the perceived congressional intent underlying the new statute. By intimating that Congress previously had decided the exhaustion issue, the Court averted a judicial policy determination.

The Court's assertion in *Patsy* that Congress intended a rigid no-exhaustion rule under section 1983, seems anomolous when considering the Court's further perception that the debates over section 1997e demonstrated vehement congressional disagreement about whether exhaustion should be required.[131] In fact, explicit adoption of an exhaustion requirement under section 1997e may be construed as evidence that Congress approves of requiring exhaustion of administrative remedies under section 1983. As the *Patsy* Court recognized, the legislative history of section 1997e exemplifies that Congress was aware of the Supreme Court's general refusal to require exhaustion.[132] Yet, in adopting section 1997e, Congress posited that an exhaustion requirement would have several beneficial results.

First, legislators believed that undesirable conditions in a particular institution could be corrected by state agencies without the necessity of a lawsuit.[133] By requiring exhaustion of state administrative remedies, many disputes could be resolved quickly at the state level where they arose, rather

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ing that one Supreme Court opinion had required exhaustion in an action filed under § 1983; however, because the plaintiff had challenged the duration of his confinement, the Court could be interpreted as merely applying the exhaustion requirement of habeas corpus. *Id. See* Preiser v. Rodriquez, 411 U.S. 475 (1973).

128. *See* 1977 *Hearings*, *supra* note 126, at 272 (statement of Rep. Drinan). During the hearings, Representative Kastenmeier explained that "the Supreme Court has held, that in 1983 civil rights suits the litigant need not *necessarily* fully exhaust state remedies." *Id.* at 57-58 (emphasis added) (statement of Rep. Kastenmeier).

129. Interestingly, before the passage of § 1977e, Georgia Patsy's counsel had argued as amicus curiae that it would be improper for Congress to impose an exhaustion requirement in the statute because the Supreme Court had already decided that no exhaustion should be required. Brief for Respondent at 61 n.26, Patsy v. Board of Regents, 102 S. Ct. 2557 (1982).

130. *See* 1977 *Hearings*, *supra* note 126, at 47, 77.

131. 102 S. Ct. at 2566.

132. *See supra* notes 84, 126 & 128 and accompanying text.

133. *See* 124 CONG. REC. 23,176 (1978). Representative Kastenmeier explained that "[t]he purpose is, in fact, to get these matters resolved at the administrative level, and not to bring 1983 petitioners to the Federal Court to make a Federal Case out of them, if it is unnecessary." *Id.* (statement of Rep. Kastenmeier).

than in federal court.[134] Thus, an exhaustion requirement would preserve judicial resources and result in efficient dispute resolution. Second, the exhaustion requirement of section 1997e was based on the legislators' belief that the states could develop adequate grievance procedures.[135] Congress discussed the effective systems and procedures already developed by some states.[136] The legislators reasoned that if complainants were required to exhaust adequate remedies, states would be encouraged to develop and improve administrative systems.[137] Finally, Congress maintained that by requiring exhaustion, the expertise of state officials would increase.[138]

After considering the merits of administrative remedies extensively, Congress determined that the interest in promoting state agencies was strong enough to justify requiring exhaustion under section 1997e. Therefore, the *Patsy* Court may have been wrong to assume Congress would disapprove of an exhaustion requirement in other section 1983 actions. Given the ambiguous legislative histories of section 1997e and section 1983, and the fact that the exhaustion doctrine is a rule of *judicial* administration, a more justifiable decision would have been reached if the *Patsy* Court had determined the policy issues involved in requiring exhaustion.[139]

COMPARISON AND IMPACT

Defects in the *Patsy* decision become particularly obvious when the case

134. *See* 124 CONG. REC. 23,179 (1978) (statement of Rep. Butler) (if states had grievance procedures and prisoners were required to utilize those procedures, a great majority of § 1983 cases would be resolved at the administrative level rather than in federal court). Legislators expressed concern over the tremendous number of § 1983 suits filed in the federal courts each year. Because nearly 95% of these cases are dismissed by the judiciary as "frivolous," Representative Sawyer was prompted to state that "as we all know, today the Federal district courts, with all due respect, give rather short shrift to these 1983 [actions]." *Civil Rights of Institutionalized: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 26 (1979).* *See* 124 CONG. REC. 23,179 (1978). It was hoped that by requiring exhaustion of adequate state grievance procedures, many of the frivolous suits would be resolved at the administrative level, thereby enabling the courts to give closer consideration to the cases brought before them. This, in turn, would have the effect of benefitting those plaintiffs with legitimate claims. 124 CONG. REC. 23,179 (1978).

135. Congress also believed that once these administrative systems were in effect, they could be "more helpful . . . than a full blown lawsuit under section 1983." 124 CONG. REC. 11,976 (daily ed. May 1, 1978) (statement of Rep. Railsback).

136. *See* H.R. REP. No. 80, 96th Cong., 1st Sess. 25 (1979). Legislators acknowledged that many state and local officials "have developed high quality grievance resolution systems." *Id.* Therefore, Congress instructed the Attorney General to consult state and local officials before establishing standards which could be followed by all states developing grievance systems. *Id.*

137. *Id. See* 1977 *Hearings*, *supra* note 126, at 34. When the bill was first introduced, Congress was advised that many states did not have grievance procedures because the states did not want to spend time and effort to establish systems that might be easily circumvented. Congress reasoned, therefore, that if exhaustion of adequate agency remedies was required, states would be encouraged to develop grievance procedures. *Id.*

138. H.R. REP. No. 80, 96th Cong., 1st Sess. 23 (1979).

139. *See supra* note 2 and accompanying text.

is compared with a Supreme Court decision rendered just six months prior to *Patsy, Fair Assessment in Real Estate v. McNary.*[140] In *Fair Assessment*, the Court refused to exercise jurisdiction over a section 1983 suit instituted to recover damages resulting from the unconstitutional collection of taxes.[141] After discussing the important and sensitive nature of state tax systems, the Court explained that the principle of comity precluded federal court consideration of the case.[142] The result of the decision in *Fair Assessment* requires taxpayers to exhaust state remedies, whether judicial or administrative in nature, before pursuing an action in federal court.[143] Consequently, federal court review may be limited drastically by the doctrine of res judicata.[144]

In contrast, the result of the decision in *Patsy* prevents courts from requiring exhaustion of adequate administrative remedies, even though state administrative findings are not binding on federal courts. In both *Patsy* and *Fair Assessment*, a strict rule was established by the Supreme Court. The *Patsy* Court determined that no exhaustion can be required in section 1983 actions, while the *Fair Assessment* Court determined that it cannot exercise jurisdiction over a taxpayer suit brought under section 1983.[145] Neither case involved a judicial assessment of the adequacy of the available state remedies.[146] The Court in *Fair Assessment* assumed that the possiblity of United States Supreme Court review of state decisions would protect the taxpayers' federal interests. Conversely, the *Patsy* Court maintained that

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140. 454 U.S. 100 (1981).

141. *Id.* at 102.

142. *Id.* at 116. In *Fair Assessment*, the state had argued that the Tax Injunction Act prevented the suit in federal court. The Court, however, recognized that the Tax Injunction Act was not controlling because the plaintiff had requested *damages* and not an *injunction*. *Id.* at 107.

Although four justices concurred with the majority decision that plaintiffs should not be able to bring their claims directly into federal court, these concurring justices based their decision on the plaintiffs' failure to exhaust state administrative remedies. *Id.* at 138 (Brennan, J., concurring). If this view were adopted, the Court would only defer its decision of the case until after the plaintiffs attempted to recover from the state. *See supra* note 29. The concurring justices maintained that although this was an action brought under § 1983, exhaustion was appropriate because in passing the Tax Injunction Act, Congress had demonstrated its intent to require deference to states' taxation systems. 454 U.S. at 137 (Brennan, J., concurring).

143. *See* 454 U.S. at 116. The majority explained that plaintiffs are not left without a remedy in cases such as this because the state court has expressly held that § 1983 suits may be brought in state court. *Id.*

144. *See supra* note 30.

145. The concurring opinion in *Fair Assessment* maintained that the majority had "renounce[d] jurisdiction over an entire class of damages actions brought pursuant to 42 U.S.C. § 1983." 454 U.S. at 117 (Brennan, J., concurring).

146. The majority in *Fair Assessment* explained in a footnote that although the adequacy of the state remedy was not an issue in the case, the remedy must be "plain, speedy, and efficient" as interpreted from the Tax Injunction Act. *Id.* at 116 n.8. As long as plaintiffs' federal rights will not be lost by seeking a state remedy, they should be required to exhaust such remedies. The Court further explained that "numerous federal decisions have treated the adequacy of state remedies, and it is to that body of law that federal courts should look in seeking to determine the occasions for the comity spoken of today." *Id.*

legislative history indicates federal courts should not trust a state agency to uphold federal rights.[147]

The rigid no-exhaustion rule established in *Patsy* is questionable in light of *Fair Assessment*. It can be argued that the inconsistency between the two decisions is based solely on the Court's interpretation of congressional intent to prohibit the federal judiciary from interfering in state taxation.[148] As noted in *Fair Assessment*, the important nature of state revenue collection systems traditionally has counselled against federal court involvement in state tax matters.[149] There are areas other than state taxation, however, in which the Supreme Court has determined that state remedies must be exhausted before a plaintiff's section 1983 claim will be heard in federal court.[150] The reasoning underlying these decisions, like that in *Fair Assessment*, conflicts with the *Patsy* Court's suggestion that states cannot be trusted to uphold federal rights.

As the Court in *Patsy* explained, the legislature, with its vast data collecting abilities, possesses superior competence to determine which situations warrant the exhaustion requirement.[151] As evidenced by the legislative histories presented in *Patsy*, however, the legislature often does not expressly decide the exhaustion question.[152] Therefore, where Congress has not confronted the issue, the responsibility to determine whether exhaustion should be required appropriately lies with the judiciary.

Relying on the ambiguous legislative histories of section 1983 and section 1997e, however, the *Patsy* majority avoided judicial determination of the relevant policy issues. No reasoning emerged from the Court's opinion which explains why a state's administrative procedures should not be trusted to decide employment discrimination claims, yet should be trusted to uphold the federal rights of the taxpayer. If the Supreme Court had held that the traditional exhaustion doctrine applied in all cases brought under section 1983, plaintiffs only would have been required to exhaust those remedies which were judicially determined to be adequate.[153] Simultaneously, states would have been assured that plaintiffs could not circumvent adequate administrative remedies.

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147. *See supra* notes 75-91 and accompanying text.

148. *See generally The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 213-14 (1982) (discussing the *Fair Assessment* concurrence and its suggestion that Congress intended the exhaustion doctrine to govern § 1983 actions raising questions of state tax administration).

149. In *Fair Assessment*, the Court explained that it has recognized the "important and sensitive nature of state tax systems and the need for federal court restraint when deciding cases that affect such systems." 454 U.S. at 102. The Court further explained that Congress also has recognized that "the autonomy and fiscal stability of the states survive best when state tax systems are not subject to scrutiny in federal courts." *Id.* at 102-03.

150. *See supra* notes 111, 133-38 and accompanying text.

151. *See supra* note 90 and accompanying text.

152. For a discussion of ambiguous legislative histories of § 1983 and § 1997, see *supra* notes 108-39 and accompanying text.

153. *See generally Exhaustion in Section 1983 Cases*, *supra* note 17, at 549 (rather than consider the nature of the right asserted, the Court should consider the adequacy of the available remedy when determining whether exhaustion should be required).

Although courts eventually may carve out areas in addition to state tax assessment in which exhaustion will be required under section 1983,[154] the rigid no-exhaustion rule established in *Patsy* precludes federal courts from considering the adequacy of an available state administrative remedy. Adverse ramifications which may ensue as a result of this preclusion were addressed by Congress when passing the limited exhaustion requirement of section 1997e. First, states may be discouraged from continuing to develop and improve administrative systems if their agencies can be circumvented.[155] Second, the expertise of administrative officials may not be utilized.[156] Moreover, if states are not encouraged to develop adequate grievance procedures, section 1983 plaintiffs may be denied the benefit of a quick resolution of their disputes and, instead, be forced to seek redress in already overburdened federal courts.[157]

Prior to *Patsy*, section 1983 actions constituted a large percentage of the federal court caseload.[158] Courts which previously applied the traditional exhaustion doctrine to section 1983 actions, however, no longer have the discretion to require exhaustion of adequate state administrative remedies. Consequently, the *Patsy* decision will cause an increase in the number of section 1983 actions heard by federal courts. The benefits derived from utilizing state administrative agencies and conserving scarce judicial resources initially may not appear to outweigh a litigant's interest in immediate access to federal court. As the *Patsy* Court recognized, however, Congress has expressed a deep concern about the capability of federal courts to handle the increasing number of section 1983 actions.[159] If the number of section 1983 actions brought in federal courts substantially increases as a result of the decision in *Patsy*, it may be to the detriment of all federal court litigants.[160]

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154. *See supra* note 111. *See generally The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 215 (1982) (persuasive considerations of policy may defeat the rigid no-exhaustion rule in some § 1983 cases).

155. *See supra* note 137 and accompanying text.

156. The expertise of agency officials may be of less import when a plaintiff's claim does not raise questions about a state's regulatory schemes, but simply requires factual determinations. Nonetheless, administrative officials who are familiar with state systems and who can quickly hear evidence about the facts may be best equipped to decide the case. *Cf.* W.E.B. DuBois Clubs of Am. v. Clark, 389 U.S. 309 (1967) (if factual determinations would aid court in resolving constitutional dispute, exhaustion of federal administrative remedies is required). Of course, federal judges can always decide the case de novo if the plaintiff remains dissatisfied after state administrative procedures have been completed. *See supra* notes 29-30.

157. *See supra* note 133.

158. Subsequent to the decisions in *Monroe* and *McNeese*, § 1983 litigation has increased dramatically. In 1961, about 270 suits were filed under the statute; but in 1981, the number of civil suits filed under the statute had risen to 30,000. Powell, *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A. J. 1370, 1371 (1982).

159. *See supra* note 134 and accompanying text.

160. *Id. See* 102 S. Ct. at 2577 (Powell, J., dissenting) (asserting that case load burden is a detriment to all federal court litigants).

CONCLUSION

Prior to the decision in *Patsy*, it had been argued that the Supreme Court had not handed down a reasoned opinion considering whether it was appropriate to require exhaustion of state administrative remedies as a prerequisite to section 1983 actions.[161] In *Patsy*, the Court again failed to delineate judicial policy in support of its refusal to apply the traditional exhaustion doctrine. Instead, the Court chose to base its decision primarily on the equivocal legislative histories of both section 1983 and section 1997e. As a result, no legitimate basis for adopting the rigid no-exhaustion rule was established.

Notwithstanding whether the Court believed the relevant considerations counselled for or against requiring exhaustion, the *Patsy* Court erred in not relying on policy considerations. The traditional exhaustion doctrine is a rule of judicial administration, and absent congressional mandate, it is the responsibility of the judiciary to determine when the doctrine should be invoked. Encouraging the development of adequate administrative remedies, utilizing the expertise of agency officials, and conserving judicial resources are interests in which federal courts always have a concern. In holding that exhaustion of adequate administrative remedies can never be required under section 1983, the *Patsy* Court unwisely relied on ambiguous legislative history rather than establish a sound policy rationale which would protect these federal concerns. As a result, states will be discouraged from developing administrative agencies which could aid in quick dispute resolution; and plaintiffs will be offered no alternative to the overburdened federal courts.

Lise Taylor Spacapan

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161. For example, Kenneth C. Davis has stated that when a case is brought under § 1983, "[a]ll reasoning about exhaustion . . . is dispensed with. . . . No matter what the reasons may be for requiring exhaustion, the judicial fiat governs and exhaustion is not required." K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 20.01 (1976).